

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of)	
Developing a Unified Intercarrier)	CC Docket No. 01-92
Compensation Regime)	

**REPLY COMMENTS
OF THE MISSOURI SMALL TELEPHONE COMPANY GROUP**

W. R. England, III
Brian T. McCartney
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue
Jefferson City, MO 65102-0456
trip@brydonlaw.com
bmccartney@brydonlaw.com
telephone: (573) 635-7166
facsimile: (573) 634-7431

Attorneys for the MoSTCG

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I. INTRODUCTION

The Missouri Small Telephone Company Group (MoSTCG)¹ is made up of nineteen (19) small telephone companies each serving between 240 to 17,040 access lines in predominantly rural, high-cost areas within the state of Missouri. The members of the MoSTCG are rural telephone companies as defined by the Telecommunications Act of 1996² (“the Act”) and are “small entities” as defined by the Federal Communications Commission (“Commission”) in its Further Notice of Proposed Rulemaking (*FNPRM*).³

In response to its *FNPRM*, the Commission received comments from over 100 parties totaling over 3,000 pages. The breadth of these initial comments demonstrates the importance of this docket to the industry and especially small rural carriers. The MoSTCG generally concurs with the comments on intercarrier compensation filed by the national groups and other organizations representing small rural carriers such as the National Telecommunications Cooperative Association (NTCA) and the Rural Alliance. The MoSTCG offers these Reply Comments because many of the proposals being examined in this case could have substantial impacts upon the MoSTCG companies and their end-user customers. The MoSTCG Reply Comments will focus on the specific issues of Virtual NXX, Wireless Traffic, Revenue Neutrality, and Transit Traffic.

¹ See Attachment A

² 47 U.S.C. § 153(37).

³ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Further Notice of Proposed Rulemaking*, FCC 05-33 (rel. March 3, 2005), ¶155.

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II. VIRTUAL NXX ISSUES

A number of parties commented on network interconnection issues and the question of whether a local exchange carrier ("LEC") should be obligated to bear the costs of delivering traffic to a point of interconnection (POI) located outside of that LEC's service area (i.e. "Virtual NXX").⁴ Some MoSTCG companies have experienced this problem first hand when competitive LECs ("CLECs") and Commercial Mobile Radio Service ("CMRS" or "wireless") carriers seek to establish a local presence in a small Missouri incumbent LEC ("ILEC") exchange by obtaining an NPA NXX "rate centered" in the MoSTCG member company's exchange. In these Virtual NXX cases, however, the CLEC or CMRS facilities are not located in the small rural ILEC exchange (or serving area) but in the regional Bell operating company ("RBOC") territory, which may be hundreds of miles away. Thus, it is not simply a matter of "loading" local NXX codes into the rural ILEC's end office facilities. Rather, the CLECs and CMRS carriers often expect that the rural ILECs will also provide for transport of the call from rural ILEC end offices to a CLEC or wireless carrier's distant POI with RBOC.

A. Practical Problems with Virtual NXX

The costs associated with carrying Virtual NXX traffic present a problem for small Missouri ILECs that provide service in remote rural areas that can be well over 100 miles away from the CLEC or wireless carrier's distant POI. For example, if a CLEC sought a Virtual NXX arrangement with the BPS Telephone Company ("BPS") Steele exchange, which is located in the southeast corner

⁴ See *FNPRM*, ¶¶87-97.

or “bootheel” of Missouri, the CLEC would expect BPS to transport CLEC traffic to the CLEC’s POI in St. Louis, Missouri, well over 170 miles away and over 170 miles outside of the BPS local exchange service area. Likewise, a wireless carrier that sought a Virtual NXX arrangement with the Mark Twain Rural Telephone Company (“Mark Twain”) Hurdland exchange in northeast Missouri would expect Mark Twain to transport the CMRS traffic to the wireless carrier’s POI in Kansas City, Missouri, over 160 miles away and over 160 miles beyond Mark Twain’s local exchange service area. As a practical and legal matter, most of the MoSTCG companies have neither the facilities nor the certificate/tariff authority to transport traffic beyond their local exchange boundaries. And as a matter of regulatory policy, there is simply no reason why small rural ILECs should be required to bear the cost of carrying CLEC and CMRS calls beyond their local exchange boundaries for the benefit of their competitors.

Comments from other small rural ILECs in this case demonstrate that Virtual NXX problems are not limited to small Missouri carriers. For instance, the California Small LECs Comments provide an example where a rural California LEC was required to transport calls 140 miles away from the rural LECs service area.⁵ The Minnesota Independent Coalition Comments explain that **“LATAs can cover hundreds of miles**, and there can be dozens of potential interconnecting carriers

⁵ California Small ILECs, *Initial Comments*, p. 3. The California Small LECs observed, “The VNXX issue is a significant problem that has the potential to cause financial disarray for small, rural carriers.” *Id.* at p. 4.

(CMRS, Virtual NXX, CLEC, VoIP, all claiming to need to exchange traffic).”⁶ A coalition of small Montana companies commented that CLECs and CMRS carriers “cannot be allowed to require rural ILECs to transport local calls to a point that in Montana is often hundreds of miles away from that ILEC’s service area and is on another carrier’s network.”⁷

The absurdity of the Virtual NXX proposition was aptly demonstrated by Missouri Public Service Commission (Missouri PSC) Commissioner Gaw during a recent hearing involving wireline-to-wireless local number portability (LNP):

[I]t sort of reminds me of a farmer with a horse and another farmer comes over and says, I like that horse, I want that horse. And the farmer says, Well, I – that’s nice. What will you give me for him? He says, I’m not going to give you anything for him. And, Oh, by the way, I want you to buy a truck and trailer and haul him over to my house for nothing. . . . this scenario asks that local company to pay for the . . . continuing transfer of that new call and whatever maintenance there is. I guess he’s got to pay for the feed and the hay too now that I think about it.⁸

The Commission should avoid the adverse impacts and undue economic burdens that Virtual NXX scenarios create, and the Commission should reject those proposals that would require small rural ILECs to pay for carrying CLEC and CMRS calls to a POI outside of the rural ILEC’s exchange

⁶ Minnesota Independent Coalition, *Initial Comments*, p. 36 (emphasis added). The Minnesota Independent Coalition comments that small, rate of return ILECs “should not be required to provide or pay for transport of traffic beyond their exchange networks.” *Id.*

⁷ Montana Independent Telecommunications Systems, Montana Telecommunications Association, and Mid Rivers Telephone Cooperative, *Initial Comments*, p. 10 (emphasis added).

⁸ *In the Matter of the Petition of KLM Telephone Company for Suspension and Modification of the FCC’s Requirement to Implement Number Portability*, Missouri Public Service Commission

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boundaries. If CLECs and CMRS carriers want to have “local” numbers in a small ILEC’s exchange area without establishing any facilities, then those carriers should make and pay for their own arrangements to transport the calls to their distant POI locations.

The proposal to require small rural ILECs to bear the costs of Virtual NXX is bad enough on its own, but increased traffic due to arbitrage issues with ISPs and the possibility of increased transiting rates hold the potential for the Virtual NXX problem to become severely worse. The United States Telecom Association (USTA) explained:

Some of these small, rural ILECs have experienced dramatic increases in transport costs imposed by a specific form of arbitrage in which CLECs create operations without transport networks and require ILECs to deliver traffic to them hundreds of miles away from the ILEC local calling areas even though the CLEC is using ‘local’ NPA-NXX codes. In these situations, the traffic flows mostly to the CLEC (and it is often bound for an ISP), so the ILEC must bear the full cost of the new indirect interconnection even though it is willing and able to enter into a direct interconnection arrangement at its local calling area (where the NPA-NXX codes would ordinarily be used).⁹

Not only does Virtual NXX traffic appear to be increasing, but the Intercarrier Compensation Forum (ICF) proposal would allow the rates for the RBOC transiting service required to carry such traffic to increase substantially.¹⁰ The Eastern Rural Telecom Association points out, “If these tandem and

Case No. TO-2004-0401, Tr. 67 (questions by Commissioner Gaw).

⁹ United States Telecom Association, *Initial Comments*, p. 32.

¹⁰ See also Qwest Communications International, *Initial Comments*, p. 38. Qwest argues that “the Commission should allow the market to establish transiting rates and those rates should be deemed reasonable absent a showing to the contrary on a case-by-case basis.”

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transit carriers are allowed to price their tandem and transit services without regulatory oversight (as proposed by ICF), the prices will be excessive.”¹¹

B. Legal Problems with Virtual NXX

Virtual NXX is not only impractical; it is also unlawful because the Act does not require small rural ILECs to bear the cost of carrying a competitor’s traffic to a POI outside of the rural ILEC’s service area. Section 251(c)(2) of the Act only requires interconnection with a local exchange carrier’s network “at any technically feasible point within the carrier’s network.”¹² The Initial Comments of John Staurulakis, Inc. explain, “Section 251(c)(2) of the Act does not require ILECs to deliver traffic to an out of service area POI; therefore, the less burdensome section 251(a), which requires carriers to connect directly or indirectly, could not require an out of service area POI. . . . Commission rules do not require rural LECs to route calls to an out-of-service area POI.”¹³ Indeed, the Commission’s rule mirrors Section 251 and only requires interconnection “at any technically feasible point within the incumbent LEC’s network.”¹⁴ Thus, the Act and the Commission’s rules do not require small ILECs to carry these calls outside of their networks. At the very least, the Commission should adopt different network interconnection rules for small rural ILECs such that “the incumbent LEC would not be responsible for delivering traffic or paying costs

¹¹ Eastern Rural Telecom Association, *Initial Comments*, p. 5 (emphasis added).

¹² 47 U.S.C. §251(c)(2)(B).

¹³ John Staurulakis, Inc., *Initial Comments*, p. 16.

¹⁴ 47 U.S.C. §251(c)(2)(B).

to a POI located outside the incumbent LEC's contiguous service area or beyond the serving area boundary."¹⁵

The Regulatory Flexibility Act (RFA) requires the Commission to prepare and publish a Final Regulatory Flexibility Analysis regarding the impact of any order issued in this docket on small entities such as the MoSTCG companies.¹⁶ Accordingly, the Commission must examine the evidence of the burdens and costs on small carriers before issuing any decision in this proceeding. The only evidence in this rulemaking proceeding thus far is that it would be complicated and costly for small rural ILECs to bear the burden and expense of carrying Virtual NXX calls to POI's far beyond their rural local exchange service areas. The examples above demonstrate the vast distances that Virtual NXX traffic would have to be carried. To make matters worse, RBOC comments in this docket indicate that some RBOCs want to charge even higher "market" rates to transport or "transit" these calls as opposed to TELRIC rates. For example, Qwest argues that "the Act does not require or permit non-market based transiting compensation rates."¹⁷ The RFA evidence in this case clearly weighs against Virtual NXX.

¹⁵ *FNPR*, ¶94, note 306 (*citing* EPG Proposal at 33).

¹⁶ *See United States Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005).

¹⁷ Qwest Communications International, Inc., *Initial Comments*, p. 38. Qwest argues that "there is no basis whatsoever under the Act for an argument that TELRIC pricing should be applied to transiting services." *Id.*

C. MoSTCG Position

The MoSTCG concurs with the following observations and recommendations by the NTCA that the Commission should establish and adopt a different set of interconnection rules that would apply to rural ILECs consistent with the Regulatory Flexibility Act (RFA):

The interconnection rules proposed in this proceeding will have a significant and very different economic impact on the small rural telecommunications carriers as compared to large telecommunications carriers. . . . Given the potential economic impact of interconnection rule changes on a substantial number of small, rural ILECs, the RFA requires that the Commission consider a separate set of rules for rural ILECs that will minimize the adverse economic impact on them.

As part of a separate set of interconnection rules for rural ILECs, **NTCA urges the Commission to not require rural ILECs to pay for any transport costs beyond their network boundaries. Competing carriers that choose to interconnect indirectly with rural ILEC networks through RBOC tandems or other forms of indirect interconnection should bear the costs of transport beyond the rural ILEC's service area.** For example, transporting CMRS traffic to a POI outside the rural ILEC network would impose additional burdens on rural ILECs to pay for costs caused by a competing carrier's choice of an indirect interconnection. This CMRS carrier's indirect interconnection POI choice should not shift the burden to pay for the costs associated with this choice onto the rural ILECs. This would be inconsistent with traditional cost-causation principles and inconsistent with the pro-competitive provisions of the Act. Competitors that chose indirect interconnection points should be required to pay for all transport outside a rural ILEC's network as part of their cost of doing business.¹⁸

In sum, the Commission should reject those Virtual NXX proposals that would require small rural ILECs to carry or pay for carrying CLEC and CMRS calls to a POI outside of the rural ILEC's exchange boundaries.

¹⁸ NTCA, *Initial Comments*, pp. 45-47. (emphasis added).

III. WIRELESS TRAFFIC

The Virtual NXX issue is particularly controversial as it relates to Sprint's Petition for Declaratory Ruling in this docket,¹⁹ and the wireless carriers and wireless industry associations comment about the rating and routing of wireless traffic first raised in Sprint's Petition. For example, CTIA – The Wireless Association claims that “LECs are required to load wireless numbers with different routing and rating points into their switches and route calls to those numbers accordingly.”²⁰ The MoSTCG concurs with the Rural Alliance that such a requirement would impose “unwarranted service and network burdens and provisioning responsibilities” on small rural ILECs that are “well beyond those actually required by law, by current rules, or under any prudent public policy.”²¹

Under the wireless carriers' proposed plan, they will neither establish any facilities nor pay any transport costs associated with serving in MoSTCG exchanges. Instead, the wireless carriers will simply shift their costs of providing service in rural areas onto the small rural ILECs that have already invested significant capital to serve rural areas. For example, Sprint urges the Commission to find that rural LECs have the obligation to treat Sprint's numbers as “local” in the absence of a direct interconnection, and Sprint claims that it “continues to be prevented from providing local

¹⁹ Sprint's Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic by ILECs, (DA-02-1740).

²⁰ CTIA – The Wireless Association, *Initial Comments*, p. 31.

²¹ The Rural Alliance, *Initial Comments*, p. 98.

wireless services to many rural areas within its coverage due to the lack of resolution of this issue.²² The MoSTCG strongly disagrees. First of all, nothing prevents Sprint from establishing local facilities in rural areas. If Sprint were serious about serving these rural areas, then Sprint could have accomplished this goal years ago by either: (a) building its own facilities, or (b) establishing agreements with other carriers. What Sprint is really seeking to do is force small rural ILECs to bear Sprint's costs of doing business. Sprint should either invest its own money in rural areas or establish agreements for its traffic rather than try and shift its costs to rural companies. Sprint's proposal should be rejected.

Nextel Partners, Inc. argues that small ILEC opposition to Virtual NXX has "inhibited competition in rural areas,"²³ but Nextel Partners offers absolutely no proof to support its claim. On the contrary, recent evidence shows that wireless carriers are already competing vigorously in Missouri and its rural areas, and the Missouri PSC has found that wireless competition is robust in rural areas. For example, the Missouri PSC found that one wireless carrier had a number of subscribers that was equal to 76% of the lines in a small rural ILEC exchange, and this same exchange was also served by six other wireless carriers.²⁴ The MoPSC found that wireless carriers

²² Sprint, *Initial Comments*, p. 18.

²³ Nextel Partners, *Initial Comments*, p. 19.

²⁴ *In the Matter of Mid-Missouri Cellular*, Case No. TO-2003-0531, *Report and Order*, issued Aug. 5, 2004.

“already have a significant presence in these service territories.”²⁵ Indeed, wireless carrier revenues in Missouri already exceed ILEC revenues.²⁶ And during the period between December of 1999 and June of 2004, wireless carriers added more than 1,000,000 subscribers in Missouri.²⁷ In 2004, wireless carriers in Missouri served 2,859,953 lines,²⁸ while Missouri’s landline carriers served approximately 3,401,869 lines.²⁹ Clearly, the wireless carriers are successfully competing in Missouri and have increased both their revenues and market share. It is past time for the wireless carriers to start paying their fair share of network costs.

Finally, T-Mobile complains that its traffic was temporarily blocked in Missouri.³⁰ The reason that T-Mobile’s traffic was blocked is because T-Mobile refused to pay the lawful, tariffed rates (or any compensation at all) for its use of the small rural ILEC networks between 2001 and 2005. All of Missouri’s other major wireless carriers played by the rules and paid for their traffic under negotiated rates or the wireless termination service tariffs that were upheld by this

²⁵ *Id.*

²⁶ *Trends in Telephone Service*, FCC – Industry Analysis and Technology Division, Wireline Competition Bureau, issued June 21, 2005. This report shows that ILECs had revenues of \$1,473,000,000, in 2003 while wireless carriers had revenues of \$1,680,000,000. *See* p. 15-9.

²⁷ *Id.* at p. 11-5. Table 11.2 shows that wireless telephone subscribers increased from 1,855,452 to 2,859,953 (an increase of over 1,000,000) between December of 1999 and June of 2004.

²⁸ *Id.*

²⁹ Missouri PSC 2004 Annual Report Data.

³⁰ T-Mobile, *Initial Comments*, p. 21.

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Commission in this docket earlier this year in the *T-Mobile* decision.³¹ T-Mobile is the only wireless carrier in Missouri that refused to pay for service. It should come as no surprise that when a customer fails to pay the lawful tariff rate for service that the service will eventually be discontinued. “It is well established that telephone companies may discontinue service to a customer in default of a tariff, as long as proper notice is given.”³² The use of the MoSTCG tariffs was upheld by both the Missouri Court of Appeals³³ and this Commission in its *T-Mobile* decision.

The block on T-Mobile’s traffic was removed on April 28, 2005 in accordance with the Commission’s *T-Mobile* order, yet T-Mobile still refuses to pay for its prior traffic in accordance with the tariffs that were upheld for past usage by the *T-Mobile* order. As a practical matter, the temporary block produced no disruption of service for end user customers since T-Mobile simply routed its traffic through IXCs instead of the RBOC (SBC). Therefore, there was no customer impact associated with the block., and T-Mobile should not be heard to complain about having its traffic blocked after more than three years of non-payment.

³¹ *T-Mobile’s Petition for Declaratory Ruling Regarding ILEC Wireless Termination Tariffs*, CC Docket No. 01-92, *Declaratory Ruling and Report and Order*, rel. Feb. 24, 2005.

³² *Sprint v. Public Service Comm’n*, 112 S.W.3d 20 (Mo. App. 2003)(finding that small rural ILEC wireless termination tariffs did not conflict with the Act).

³³ *Id.*

IV. REVENUE NEUTRALITY

Both the Missouri and federal Constitutions prohibit the confiscation of a public utility company's property by depriving the utility from receiving reasonable compensation for the use of its facilities and services. The Supreme Court has explained, "If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments."³⁴ Small rural ILECs such as the MoSTCG member companies have a constitutional right to a fair and reasonable return upon their investment in rural telecommunications networks. The Commission and the Missouri PSC have a legal responsibility to ensure that the small rural ILEC's network facilities are not utilized in a manner that is confiscatory.³⁵ Accordingly, the Commission cannot disturb a small rate-of-return ILEC's revenue streams that have been approved by either the Commission or the Missouri PSC without providing a replacement because this would be clearly confiscatory.

Revenue neutrality could be especially problematic for intrastate revenues in this case.

NTCA's Initial Comments explained:

Any move to adopt a bill and keep regime at the federal level, either on a mandatory or optional basis, will have significant implications in the intrastate jurisdiction. The data shows the impact on the intrastate level to be more harmful to rural LECs than in the interstate jurisdiction. NTCA estimated the annual state impact to be \$1.139 billion and the interstate impact to be \$884 million."³⁶

³⁴ *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989).

³⁵ *Smith v. Illinois Bell*, 270 U.S. 587, 591-92, 46 S.Ct. 408, 70 L.Ed 747 (1926).

³⁶ NTCA, *Initial Comments*, p. 61.

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Any Commission order that deprives small rural ILECs of these existing revenues stream generated by lawful rates would amount to a taking of property without due process of law.³⁷ Therefore, outside of a rate case, the Commission is obligated to make the small rate base/rate of return regulated ILEC whole (i.e. revenue neutral) should the Commission's decision adversely affect the LEC's regulated revenue streams.

V. TRANSITING TRAFFIC

In Missouri, the RBOC – Southwestern Bell Telephone d/b/a SBC Missouri (“SBC”) – was able to obtain PSC approval of its “transit” arrangement by claiming that it was required to transit traffic at TELRIC rates. The approval of SBC's transit arrangement led to years of litigation and proceedings before the Missouri PSC between carriers using SBC's transiting service and the small rural carriers downstream that were left holding the bag for uncompensated wireless traffic and unidentified “phantom” traffic delivered over SBC's facilities.³⁸ Now, SBC claims that it does not have to offer the service at TELRIC rates, and SBC also claims that such arrangements are not subject to the 251/252 provisions in the Act. The MoSTCG believes that if SBC wants to offer

³⁷ *U.S. Const. Amend. XIV and Mo. Const. Art. I, § 10. See Lightfoot v. City of Springfield*, 236 S.W.2d 348 (Mo. 1951); *Bowling Green v. Straube*, 227 S.W.2d 666 (Mo. banc 1950).

³⁸ See e.g. *Sprint v. Public Service Comm'n*, 112 S.W.3d 20 (Mo. App. 2003); *AT&T v. Public Service Comm'n*, 62 S.W.3d 545 (Mo. App. 2001); *Alma Telephone Co. et. al. v. Public Service Comm'n*, Mo. Supreme Court Case No. SC86529 (pending); *BPS Telephone et. al v. T-Mobile*, Case No. TC-2002-1077 (complaint for unpaid termination of wireless traffic); *Investigation into Signaling Protocols, Call Records, Trunking Arrangements, and Traffic Measurement*, Case No. TO-99-593 (examining call records and “phantom traffic” problems).

transit service at “market” rates, then those agreements must be subject to the 251/252 provisions of the Act.

In addition, if SBC wants to offer “transiting” service encompassing long distance or “toll” interexchange traffic, then SBC must factor termination costs into its rates and compensate the small rural carriers directly for all of the traffic that SBC delivers to MoSTCG company exchanges, just as the traditional IXC’s do today. As a policy matter, this approach will address the potential anti-competitive impacts presented by RBOC acquisitions of the traditional IXC’s such as SBC’s pending acquisition of AT&T and the Verizon’s proposal to acquire MCI. This proposal will also help address “phantom traffic” problems because SBC will have the incentive to make sure all of the traffic it delivers to small ILEC exchanges is identified. Conversely, allowing SBC to increase the use of transiting traffic without bearing any responsibility for seeing that small ILEC’s are compensated for terminating the “transit” traffic is only likely to exacerbate the problem of “phantom” traffic.

VI. CONCLUSION

The Commission should find and conclude that small rural ILEC’s have no obligation to carry Virtual NXX traffic or pay transport costs beyond their network boundaries. Accordingly, Sprint’s Petition on rating and routing issues should be denied.

Under state and federal law, any decision in this case that impacts the revenue streams of small rate-of return regulated ILEC’s must be revenue neutral. RBOC transiting traffic must be subject to the 251/252 provisions in the Act, and RBOC’s must factor termination costs into their

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rates and compensate rural ILECs directly if they seek to offer “transiting” service that encompasses the delivery of long distance or “toll” interexchange calls to rural ILEC exchanges.

Respectfully submitted,

Brian T. McCartney

W. R. England, III Mo. #23975

Brian T. McCartney Mo. #47788

BRYDON, SWEARENGEN & ENGLAND P.C.

312 East Capitol Avenue

Jefferson City, MO 65102-0456

trip@brydonlaw.com

bmccartney@brydonlaw.com

telephone: (573) 635-7166

facsimile: (573) 634-7431

Attorneys for the MoSTCG

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ATTACHMENT A

BPS Telephone Company
Citizens Telephone Company
Craw-Kan Telephone Cooperative, Inc.
Farber Telephone Company
Fidelity Telephone Company
Granby Telephone Company
Grand River Mutual Telephone Corp.
Green Hills Telephone Corp.
Holway Telephone Company
Iamo Telephone Company
Kingdom Telephone Company
KLM Telephone Company
Lathrop Telephone Company
McDonald County Telephone Company
Mark Twain Rural Telephone Company
Miller Telephone Company
New Florence Telephone Company
Peace Valley Telephone Co., Inc.
Rock Port Telephone Company

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